FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 339.

CITY OF NEW ROCHELLE,

Petitioner,

—against—

WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

CHARLES S. RHYNE,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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Judicial Code as amended (U. S. C. A. Title 28, Section 344, Paragraph B):

Section 237 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .

CITY OF NEW ROCHELLE,

Petitioner,

—against—

WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY,

Respondents.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the City of New Rochelle for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New York entered in the above entitled proceeding in the office of the Clerk of the County of Westchester on the 26th day of May, 1942 upon the remittitur of the Court of Appeals of the State of New York respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF FACTS, THE PROCEEDINGS AND THE DECISIONS BELOW.

Prior to the year 1900 the Village of New Rochelle granted certain consents to the respondents and their predecessors in interest to operate a trolley line along

certain streets within the Village. The consents so granted did not contain a period of time for which they were to continue.

Subsequent to the granting of the consents the Village was incorporated and became a city and succeeded to all of the rights and privileges of the Village.

At the time of the granting of the consents the population of the Village of New Rochelle was 8,217 as shown by the figures of the Bureau of Census of the Department of Commerce of 1890 (542-545). According to the last census the population of the City of New Rochelle was in excess of 60,000 (55).

When the original consents were granted the companies operating used the horse-car as a method of transportation. The electric trolley car was first introduced as a means of transportation in the early 90's (468) and the bus as a means of transportation was not known and did not make its appearance until 1914 (470).

By virtue of these changed conditions and other changes which will be noted hereafter and pursuant to its authority, the Council of the City of New Rochelle adopted a resolution (118-125) terminating the consents granted to the respondents and directing the respondent, Westchester Electric Railroad Company, to cease operating the "A" trolley line within sixty days after receipt of the notice. The resolution authorized the Corporation Counsel on behalf of the City of New Rochelle to commence an action in a court of competent jurisdiction upon the failure of the Westchester Electric Railroad Company to cease operating the aforesaid "A" trolley line. The respondent Company received a copy of said resolution and refused to comply therewith and accordingly this action was commenced.

This action was brought to have the Court declare the rights and legal relations between petitioner and respond-

ents under the aforesaid consents. The complaint sets forth four causes of action under which the petitioner contends it is entitled to have the Court declare that the respondents do not have the right to continue the operation of the trolley line commonly designated as the "A" line.

The Complaint.

Those portions of the complaint which are relevant upon this appeal are as follows:

The first cause of action alleges in part that the consent from the Trustees of the Village of New Rochelle to operate a trolley line along certain streets of the Village which is a part of the "A" line did not contain therein a period of time for which the consent was to continue (21); that the consent which was granted was terminated by the City of New Rochelle and a demand made upon the respondent, Westchester Electric Railroad Company to cease operating the aforesaid "A" trolley line; that the said consent did not grant permission to the respondent, Westchester Electric Railroad Company to operate a trolley line along certain streets in the Village, which is now a part of the "A" line (19-20).

The second cause of action alleges that the consents to operate a trolley line along certain streets in the Village of New Rochelle were granted to New Rochelle Street Horse Railroad Company, the New Rochelle Railway & Transit Company, New Rochelle and Pelham Railway Company and Westchester Electric Railroad Company and that the consents so granted did not contain a period of time for which they were to continue (26-50) and that all of the consents were terminated by the Council of the City of New Rochelle.

The third cause of action alleges that the consents in

question were granted many years ago when the population of the Village was approximately 9,000; that a substantial portion of the properties in the City were not then developed; that the automobile was not then used as a means of transportation; that the population of the City of New Rochelle in 1939 was in excess of 50,000; that the operation of the trolley along its present route constitutes a dangerous and hazardous condition and that the convenience of the City no longer requires the presence of the trolley car and in general that the continued operation of the "A" line constitutes a peril and danger to persons and property on the street; that transportation by means of street cars is not a modern means of transportation; that it has become out-moded and that it was not the intent of the Trustees of the Village of New Rochelle when the consents were granted that the said consents should continue beyond a reasonable time.

The fourth cause of action alleges in part that the consent granted to the Westchester Electric Railroad Company on March 7th, 1898 provided that if future Village improvements required the change of the grade or bed of the tracks that the Company was to make such changes without cost to the Village; that in 1931 the City of New Rochelle improved Rose Street (now North Avenue) by widening the same and the said improvement required the changing of the bed of the tracks along said street; that the Westchester Electric Railroad Company was duly requested to change the bed of its tracks at its own cost and expense but it failed and refused to do so unless it received some consideration, as a result of which the City was obliged to waive the assessment which was to be levied against the said Westchester Electric Railroad Company under the provisions of the Charter of the City of New Rochelle for the paving of Rose Street (now North Avenue).

Each one of the consents referred to in the second cause of action contains a portion of the route now operated by the respondent and it is by putting together these portions of the routes contained in the various consents that the respondent now contends that it has the right to operate the trolley line in question.

Decisions in Courts Below.

The issue was tried before Hon. Gerald Nolan, one of the Justices of the Supreme Court of the State of New York in the County of Westchester and a decision was rendered in favor of the respondent, Westchester Electric Railroad Company, dismissing the complaint insofar as it seeks an injunction restraining the operation of the aforesaid "A" trolley line (240-264) and judgment was entered in favor of the said respondent in the office of the County Clerk of Westchester County.

In his opinion in the Court below (817-830) Judge Nolan held that although the franchises in question were unlimited as to the term or duration, that said franchises constituted property and when once granted cannot be taken away save by the terms therein prescribed or by due process of law; that the resolution of the Council of the City of New Rochelle terminating such franchises did not constitute due process and that under the settled law of the State the respondent had a property right in said franchises from the enjoyment of which it could not be excluded without compensation; that if public interest required the termination of the franchises, the result could be accomplished by purchase or condemnation.

Upon appeal to the Appellate Division of the Supreme Court of the State of New York the judgment was affirmed without opinion.

An appeal by permission of the Court of Appeals was

thereupon taken to the Court of Appeals of the State of New York where the judgment was again affirmed without opinion.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

A. It is for this Honorable Court alone to determine:

1. Whether a consent granted by a municipality unlimited as to time or duration, may not be terminated at will by the municipality granting the same.

2. Whether the use of public streets can be permanently parted with by a municipality in favor of private interests.

3. Whether a municipality, in view of the changed conditions since the granting of a consent, can terminate the same upon the ground that the continued operation under the consent is a hazard and constitutes a peril and danger to persons and property.

B. In the case of *Blair* v. *Chicago*, 201 U. S. 400 decided by this Honorable Court, the Court held that a consent of a municipality to a utility company without limitation as to time did not amount to a franchise in perpetuity.

C. The case of *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, decided by this Honorable Court involved a grant to a gas company of the right to use the streets of a municipality for the laying of its pipes and the Court held that the Company did not acquire any specific location in the streets and laid the pipes at the risk that they might at some future time be disturbed when the State might require for a necessary public use that changes be made.

D. The Court below based its decision on the case of *People* v. *O'Brien*, 111 N. Y. 1, decided by the Court of Appeals of the State of New York in 1888 and it is respectfully submitted that the decision in the case of *People* v. *O'Brien* is not in accord with the applicable decisions of this Honorable Court and that the decision and judgment of the Court below was thereby rendered to the damage and detriment of your petitioner.

The case at bar is of extreme importance inasmuch as it involves the question as to whether or not a municipality can permanently part with the use of the public streets in favor of private interests when in the course of years it appears that such use of the streets is being made to the damage and detriment of the people of the City.

It is submitted that the Court below erred in holding that inasmuch as the consent was silent as to time or duration, such silence was deemed to be the granting of a perpetual franchise. It is submitted that the Court below thereby construed the consent in favor of private interests as against the interest of the people of the City and that where two meanings can be applied to a consent that the consent should be construed in favor of the people as against private interests; that where a private interest takes a consent without a limitation of time it takes it at its own risk, subject to a revocation at will by the municipality. In construing a consent which is silent as to time or duration the Court should, applying the principle of "The greatest good for the greatest number" construe said franchise in favor of the people as against the private interest.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court directed to the Special Term of the Supreme Court of the State of New York commanding that Court to cer-

tify and send to this Court for its review and determination a full and complete transcript of all proceedings in the above entitled case and that the judgment therein entered on the 26th day of May, 1942 upon the remittitur of the Court of Appeals of the State of New York be reversed by this Court and that your petitioner may have such further relief as this Court may deem proper.

And your petitioner will ever pray.

Dated: August 21, 1942.

CITY OF NEW ROCHELLE,
By AARON SIMMONS,
Director of Law of the City of New Rochelle
and Corporation Counsel.

CHARLES S. RHYNE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The decision of the Supreme Court at Special Term is reported in 176 Misc. 1044 and appears in folios 817-830 of the Record on Appeal.

The Appellate Division affirmed this decision on August 4th, 1941 without opinion (226 App. Div. 874).

The Court of Appeals affirmed the decision on April 25th, 1942 without opinion (288 N. Y. (mem.) 95).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Section 344, Paragraph B) which gives this Court jurisdiction to review by certiorari in cases in which a final judgment or decree has been rendered or passed upon by the highest Court of the State in which a decision could be had where any title, right, privilege or immunity is specifically set up or claimed by either party under the Constitution of the United States.

In his opinion at Special Term, Judge Nolan held that the franchises in question constitute property and when once granted cannot be taken away save by the terms therein prescribed or by due process of law (821). He held in effect that the resolution terminating the franchises did not constitute due process of law. Thus a constitutional question is directly raised which it is for this Honorable Court alone to determine.

Argument.

I. It is for the Supreme Court of the United States to determine whether the resolution terminating the franchises constitutes due process.

The exact definition of "due process" is not set forth in either the State or Federal Constitutions and many learned Judges have given different opinions concerning it but all are apparently agreed that "due process" constitutes a definite assurance to every person of an opportunity to be heard, defend and preserve his rights.

The respondent was not deprived of an opportunity to be heard and to defend and preserve its rights.

In fact if we look at the situation from the viewpoint of the petitioner it will be realized that the petitioner was deprived of its property without due process of law by the declaration of the Supreme Court of the State of New York that the consents were perpetual.

The right to the use of the streets and the streets themselves belong to the people of the city. In 1886 permission to use these streets was granted to the respondents by the village trustees. The consents did not state that they were to be perpetual. As a matter of fact they did not contain any time limit at all. In the absence of a specific declaration it should not be construed that the village trustees intended to permanently part with the right to use these streets. Any declaration to that effect is to deprive the petitioner of its property in the streets without due process of law.

The city now wishes to change its outmoded method of transportation and in fact offered the respondents the opportunity to provide the modern method of transportation. The respondents refused and the city took the next logical step to obtain this transportation—it

terminated its consent to use the streets. A denial of this right by the Supreme Court of the State of New York is to deny to the city the right to use its own property as it sees fit. It is a declaration that the city has forfeited all control of its streets in favor of private interests as against the public interests.

II. In the absence of specific provisions to the contrary the consent should be construed in favor of the petitioner.

In passing upon similar consents and franchises the Supreme Court of the United States in the case of *Blair* v. *Chicago*, 201 U. S. 400, held that any rights that are asserted against the State must be clearly defined and plainly expressed and should not be raised by inference or presumption and that if a grant is silent about a right or power it does not exist.

Applying this logic to the case at bar it is submitted that the decision of the Supreme Court of the State of New York was in violation of these principles and that inasmuch as the right to use the streets in perpetuity was not expressly set forth in the consent such a right did not exist.

Judge Day in writing the opinion of the court in the *Blair* case stated at pages 471-472:

> "Since the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the state, or municipalities acting under state authority. Concurrent with this principle, and to be considered when construing an alleged grant of this character,

is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest." * * *

"'The rule of construction in cases of this description * * * is this,—that any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' In the case of *The Binghamton Bridge* (*Chenango Bridge Co.* v. *Binghamton Bridge Co.*), 3 Wall. 51, 75, 18 L. ed. 137, 143, it was said: 'The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.'" * * *

"Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865 contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years, and for

that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted fail when they can only be maintained by strained construction in their favor."

III. The decision of the Supreme Court of the State of New York is not in accord with the applicable decisions of this Honorable Court.

In the case of *Blair* v. *Chicago, supra,* in construing a consent granted to a transportation company which was silent as to the term of the grant the court stated at page 481:

> "In the west side system, the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets, * * *."

Again in the case of *New Orleans Gas Light Company* v. *Drainage Commission,* 197 U. S. 453, in which case the plaintiff contended that having acquired a franchise for the purpose of laying pipes and conduits in the cities that it had acquired a property right which could not be taken from it without compensation there was nothing in the terms of the grant to the plaintiff to indicate the

intention of the state to give up its control of the public streets as in the case at bar.

The court in the *New Orleans* case held at page 461:

> "It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made.
>
> This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control."

CONCLUSION.

In view of the foregoing it is respectfully submitted that the petition for the issuance of a writ of certiorari be granted.

Respectfully submitted,

CHARLES S. RHYNE,
Counsel for Petitioner,
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Washington, D. C.

Opinion Rendered by Trial Justice Nolan, Reported in 176 Misc. 1044.

The New York Law Journal, December 2, 1940.

City of New Rochelle v. *Westchester Elec. RR.*—The defendant Westchester Electric Railroad Company operates a street railway line known as the New Rochelle-Subway, or "A" line, from the northerly terminal of the subway on White Plains Road at Two Hunrded and Forty-second Street, in the Borough of the Bronx through the City of Mount Vernon, the villages of Pelham Manor and Pelham and the City of New Rochelle, to a terminal at or near the New Rochelle station of the New York, New Haven & Hartford Railroad Company. The portion of the route of this line within the City of New Rochelle is upon streets covered by franchises granted to the Westchester Electric Railroad Company and to predecessor companies, namely the New Rochelle Street Horse Railroad Company, the New Rochelle & Pelham Railway Company and the New Rochelle Railway & Transit Company. On March 6, 1939, the Council of the City of New Rochelle adopted a resolution purporting to terminate the consents and franchises granted to the defendant and its predecessors in interest for the operation of the "A" trolley lines, directing the defendant to cease operating the "A" trolleys, and authorizing the commencement of an action if the defendant should fail so to do. This action grows out of the refusal of the defendant Westchester Electric Railroad Company to cease such operation.

The franchises in question are unlimited as to term or duration.

It is claimed by the plaintiff that the franchises in question may be terminated at will, since public convenience and safety require such termination. In support of the allegations of the complaint as to the necessity of such termination the plaintiff has introduced evidence

to the effect that considerable congestion exists in the streets over which the "A" line runs, caused by the trolleys and by automobile traffic and parking. Undoubtedly the elimination of the "A" trolleys would improve conditions considerably. It may be that conditions might be likewise improved by regulation of defendant's operations, and of traffic and parking in the areas where congestion has resulted. Plaintiff does not seek to regulate, however, but seeks to terminate entirely the franchises heretofore granted.

Plaintiff's difficulty lies in the fact that the franchises in question are unlimited as to time or duration. Such franchises constitute property. When granted they cannot be taken away save by the terms therein prescribed or by due process of law. (*People* v. *O'Brien*, 111 N. Y. 1; *City of N. Y.* v. *N. Y. Central RR.*, 234 N. Y. 113; *N. Y. & Queens Electric Light & Power Co.* v. *City of N. Y.*, 221 App. Div. 544; *Coney Island, Fort Hamilton & Brooklyn RR.* v. *Kennedy*, 15 App. Div. 588; *Eighth Ave. Coach Corp'n.* v. *City of N. Y.*, 170 Misc. 243.) Under the settled law of the state the defendant has a property right in its franchises, from the enjoyment of which it cannot be excluded without compensation. If public necessity requires its exclusion the result can be accomplished by purchase or by condemnation (*Coney Island, Fort Hamilton & B'klyn. RR.* v. *Kennedy*, supra). Plaintiff contends that the franchises have been forfeited by nonuser and by failure to file the bonds required. These allegations of the complaint have not been established by the evidence.

A question arises, however, with respect to certain portions of the defendant's line which are operated pursuant to franchises granted to predecessor companies. The defendant claims the right to these franchises by virtue of the surrender by the New Rochelle Railway and Transit Company of all of its capital stock to Westchester Elec-

tric Railroad Company by certificate dated May 31, 1893, filed and recorded in the office of the Secretary of State. The certificate of such surrender, produced on the trial states that it was given and filed in pursuance of section 79 of the Railroad Law of 1892. The statute then in effect (chap. 565, Laws of 1890, amended by Laws of 1892), provided that any railroad corporation, being the lessee of the road of any other railroad corporation, might take a surrender or transfer of the capital stock of the corporation whose road was held under lease, and that whenever the whole of such capital stock was so surrendered, and a certificate thereof was filed, the franchises of the corporation whose stock had been so surrendered thereupon vested in the corporation to which such surrender had been made. No provision was made by the statute for such a transfer to or the vesting of such property in a railroad corporation which was not a lessee. The plaintiff now contends that no proof has been presented that the defendant at the time of the acquisition of the stock of its predecessor company, was a lessee of the road operated by it. This question was not litigated on the trial. The franchises of the predecessor companies and the certificate of the surrender of capital stock were annexed to plaintiff's complaint and received in evidence without objection. The certificate states that it was given pursuant to the statute. Since the statue makes no provision for a transfer of stock to any corporation other than a lessee the natural inference from the evidence presented is that at the time of the transfer the defendant was a lessee of its predecessor company. The fact that the franchises of the predecessor companies were held by the defendant appears to have been recognized by the plaintiff by the contract between the parties dated December 27, 1905, and received in evidence as defendant's Exhibit "C". On the evidence presented it may not be decided that the defendant is operating on Main Street between Center Avenue and North Avenue, and on Huguenot Street between Center Avenue and North Avenue, without a fran-

chise. No franchise has been produced for the operation of defendant's line on Bridge Street between Huguenot Street and Railroad Place. It appears from the evidence presented, however, that the operation of defendant's line on Bridge Street was approved by the plaintiff by agreement between the plaintiff, the defendant, and the New Haven Railroad Company dated April 21, 1905 (defendant's Exhibit "N"), and the blueprint attached to that agreement shows an existing track on Bridge Street. Under the circumstances and in the absence of other evidence, it must be presumed that a consent to such operation was obtained (*Railroad Law*, sec. 171; *People ex rel. City of N. Y.* v. *N. Y. R'ys.*, 217 N. Y. 310).

The complaint, in so far as it seeks an injunction restraining operation of the defendant's "A" line, is dismissed, but since proof may be available as to the nature of defendant's rights with respect to its operation on Main and Huguenot Streets, between Center Avenue and North Avenue, and on Bridge Street, between Huguenot Street and Railroad Place, without prejudice to another action with respect to such portions of defendant's "A" line. The judgment may declare that the defendant Westchester Electric Railroad Company has the right to continue its operation of said line by virtue of the consents referred to in the complaint and marked Exhibits Nos. 1, 2, 9, 10 and 11, and that such consents were not terminated by the resolution of March 6, 1939. On the evidence presented the court will not declare the rights of the parties with respect to the consents referred to in the complaint and marked Exhibits Nos. 4, 5, 6 and 7. Settle decision and judgment on notice.

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SEP 16 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942.

No. 339

CITY OF NEW ROCHELLE,

Petitioner,

AGAINST

WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY,

Respondents.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

ALFRED T. DAVISON,
Counsel for Respondent,
The Westchester Electric Railroad Company.

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Supreme Court of the United States

OCTOBER TERM—1942.

CITY OF NEW ROCHELLE, *Petitioner,* AGAINST WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY, *Respondents.*	No. .....

Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

Statement.

The petition is for review on writ of certiorari of the decision of the court of last resort of the State of New York, whereby petitioner's "complant, in so far as it seeks an injunction restraining the operation of the defendant The Westchester Electric Railroad Company's 'A' line, be, and the same is hereby dismissed, without prejudice to another action with respect to the portions of the said 'A' line on Main Street and Huguenot Street between Center Avenue and North Avenue, and on Bridge Street between Huguenot Street and Railroad Place" (R. 90).

Objections to Jurisdiction.

Pursuant to Rule 7, Paragraph 3 of this Court, respondent objects to the entertaining of this application on the following grounds:

I.

Failure to comply with Rule 38, Paragraph 2, requiring that the petition shall contain "a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question" in that as required by the reference to Rule 12 (contained in said Paragraph 2, Rule 38), there is no "statement of the grounds upon which it is contended the questions involved are substantial"; nor is there any specification of "the stage in the proceedings in the Court of first instance, and in the appellate court, at which, and the manner in which", any so-called "federal questions sought to be reviewed were raised"; nor is there any specification of "the method of raising them"; nor is there any specification of "the way in which they were passed upon by the Court"; nor are there any "pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears".

(The above quotations are of applicable portions of the rules.)

In Rule 12 it is provided:

> "The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. See Rule 38, Paragraph 2."

II.

If the three paragraphs numbered 1, 2 and 3 on page 6 of the petition, under the heading "Reasons Relied on for Issuance of the Writ", can be considered compliance with the requirement in Paragraph 2 of Rule 38, that the petition shall contain the "questions presented", then the questions so stated do not present any federal question.

In support of this specification see pages 6 and 7 *infra*.

Rule 38, Paragraph 2 provides:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

III.

Although the brief in support of the petition for writ of certiorari claims jurisdiction on the ground that this is a case (p. 9 of Petitioner's Brief)

> "where any title, right, privilege or immunity is specifically set up or claimed by either party under the Constitution of the United States."

no such title, right, privilege or immunity was set up or claimed in any Court below, and the record shows that no federal question was ever raised or decided in any Court below.

In support of this specification of lack of jurisdiction, see Point I, *infra*.

Statement of Facts.

The statement of facts contained in the petition does not contain certain material facts which are necessary. For that reason, we supplement the statement contained in the petition with the following facts.

New Rochelle Railway and Transit Company, named as a respondent, was not, and could not be, served with process herein; it could not be so served because, as the record shows (R. 14, 55, 169), and as the Court found (R. 82), New Rochelle Railway and Transit Company was merged into The Westchester Electric Railroad Company on June 2, 1893, by the filing of certificate of surrender of capital stock (Finding of Fact 9, R. 82) and, therefore, since that date has had no existence separate and apart from The Westchester Electric Railroad Company.

Therefore, when reference is made herein to respondent, such reference is to The Westchester Electric Railroad Company.

Respondent operates its main street railway line, known as the New Rochelle Subway Line or "A" Line, between the southerly terminus thereof, which is at the northerly end of the subway in New York City on White Plains Road at 242nd Street, and the northerly terminus of said "A" Line, which is at or near the station of the New York, New Haven and Hartford Railroad Company, in the City of New Rochelle, the intervening operation between such termini being through the City of Mount Vernon, the Villages of Pelham and Pelham Manor and in the City of New Rochelle (Map, Defendant's Exhibit AA, R. 175, 287).

The line carries upwards of 3,500 passengers daily (R. 180).

The portion of the route of this line within the City of New Rochelle is over streets covered by franchises granted to respondent and its predecessor companies, New Rochelle Street Horse Railroad Company, New Rochelle & Pelham Railway Company, and New Rochelle Railway and Transit Company (R. 85) in 1886 and subsequent years. By surrenders of capital stock, the above mentioned predecessor companies were merged into re-

spondent under the Railroad Law of the State of New York (R. 82).

The above mentioned franchises were unlimited as to time or duration (R. 82, 94).

This action by petitioner was predicated on the refusal of respondent to comply with the resolution adopted by the Common Council of petitioner on March 6, 1939, which resolution, claiming that because no dates of maturity were specified in respondent's franchises such respondent's franchises could be terminated at will, purported to terminate the above mentioned franchises and directed respondent to cease the operation of its "A" Line over streets in the City of New Rochelle (Exhibit 3, annexed to Complaint, R. 39, *et seq.*).

Respondent did not cease to operate such "A" Line in the City of New Rochelle and this action was instituted by petitioner, and in its complaint petitioner prayed for judgment declaring the rights of the parties under the above mentioned franchises, and for an "order" (*sic*) restraining respondent from continuing its operation of the "A" Line in the City of New Rochelle (R. 25, 26).

In the petitioner's complaint, there are certain allegations, denied by respondent, of non-user and of violation of franchise obligations and of operating on certain streets without a franchise, but the Courts below have found against petitioner on these claims (R. 85-87) and no claim is made on this application for review thereof.

The Trial Court found and decided that respondent's franchises, being unlimited as to time and duration, could not be terminated or taken by petitioner without compensation, and that said franchises were not terminated by the aforesaid resolution of the Common Council of petitioner, on which this action is predicated, and that respondent had the right to continue the operation of its "A" Line (R. 86-88).

Accordingly judgment was entered as stated at the outset of this brief (R. 89-90).

As to the Alleged Reasons Relied on for Issuance of a Writ.

The first reason marked "A" on page 6 of the petition has no substance because it is predicated on the statement that it is for this Court alone to determine the three so-called questions set forth on page 6, not one of which presents a Federal question or makes any reference to any right claimed under the United States Constitution.

The first so-called question under A (p. 6 of petition) would call for a determination by this Court of whether a franchise which is without limit as to time or duration is perpetual, and not a determination of whether a municipality which has granted a franchise which the Court construes to be perpetual has the right under the Constitution of the United States to terminate such franchise.

Nowhere in this first so-called question is there a claim of a right under the Constitution.

Furthermore, petitioner makes no claim that if a municipality grants a franchise which by its express terms is perpetual such municipality would have the right to terminate such franchise at will; inasmuch as the State Courts have in this case construed these franchises to be perpetual, it follows that the only question which petitioner is seeking to propound in this Court is concerning the construction of the franchises and not the right to terminate them.

The second so-called question under A (p. 6 of petition) would call for a determination by this Court of whether a certain act by a municipality is *ultra vires,* and this is not a Federal question nor does it involve a determination of any right claimed under the Constitution of the United States.

Old Colony Trust Co. v. *Omaha,* 230 U. S. 100, 116.

It is to be noted in passing that a franchise to a public utility is not parting with "the use of public streets" "permanently" "in favor of private interests".

The third so-called question under A (p. 6 of petition) is predicated upon facts which the State Courts have in this action refused to find, that is to say, the State Courts refused to find that "the continued operation under the consent is a hazard and constitutes a peril and danger to persons and property", as is stated as a premise in this third so-called question.

See proposed Finding of Fact numbered 14 (R. 76-78) and proposed Conclusion of Law numbered 5 (R. 79) contained in the proposed Findings of Fact and Conclusions of Law (R. 73-80) presented by petitioner and which the Trial Court refused to find or sign.

Furthermore, the Findings of Fact and Conclusions of Law which the Court did sign (R. 80-88) absolutely omit any reference whatsoever to petitioner's claim of hazard or peril and danger to persons and property.

The second reason marked "B" on page 6 of the petition has no substance because as shown (*infra,* p. 15) *Blair* v. *Chicago,* 201 U. S. 400, merely held that where a franchise, limited as to duration, had been granted for the operation of a system and then a franchise was later granted for an extension of that system, which franchise for extension was not limited as to duration, the grantee of the franchise for the extension could not operate the extension beyond the time limited by the franchise covering the original system.

Furthermore, in *Blair* v. *Chicago* this Court expressly stated that it followed the ruling of the Illinois Supreme Court. If in this case, quite aside from *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the ruling of the highest Court

of the State of New York is followed, then the fact that the New York Courts in this case have held respondents' franchises to be perpetual deprives petitioner of any ground for a writ.

As later shown (*infra*, p. 14), the ruling of the State Courts in this case is in accord with the applicable decisions of this Court.

The third reason, marked "C" on page 6 of the petition, has no substance because, as shown by the petition itself, *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, merely had reference to the relocation of pipes laid in the street and is entirely inapplicable to this case.

The fourth reason, marked "D" on page 7 of the petition, has no substance because this Court in *City of Owensboro* v. *Cumberland Telephone and Telegraph Co.*, 230 U. S. 58, specifically cited *People* v. *O'Brien*, 111 N. Y. 1, and stated that such decision had been accepted and approved by this Court in *Detroit* v. *Detroit Citizens' Street Railway Company*, 184 U. S. 368, 395.

Furthermore, *People* v. *O'Brien* and the decision of the State Courts in this case are in entire accord with the applicable decisions of this Court which are cited (*infra*, pp. 14, 15).

The second paragraph on page 7 of the petition immediately following the paragraph marked "D", is but a repetition of the claim of *ultra vires* on the part of the City in the granting of respondents' franchises, and is purely a matter of local law and presents no Federal question whatsoever.

Summary of Argument.

I.

No Federal question was raised or decided in this action in the Courts of the State of New York and, there-

fore, there is no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code.

II.

Even if the Courts below had decided a Federal question as claimed by petitioner herein, such determination was in accord with applicable decisions of this Court and, therefore, the claim of a Federal question is without substance.

III.

Answering Petitioner's Point I.

No question of due process is available to petitioner.

IV.

Answering Petitioner's Point II.

The construction of the franchises is a common law question for determination by the State Courts which cannot be presented to, or relied upon in, this Court on this application.

V.

Answering Petitioner's Point III.

The decision of the Supreme Court of the State of New York is in accord with the applicable decisions of this Court.

VI.

Conclusion.

ARGUMENT.

POINT I.

No Federal question was raised or decided in this action in the courts of the State of New York and, therefore, there is no basis for invoking the jurisdiction of this court under §237 of the Judicial Code.

The pleadings in the action assert no rights under the Constitution of the United States, and at no stage of the proceedings in this action in the Courts of the State of New York was any reference made to the Constitution of the United States.

It is well established by the decisions of this Court that it is essential to the jurisdiction of this Court, in reviewing a decision of a State Court, that it must appear affirmatively from the Record not only that a Federal question was presented to the highest court of the State having jurisdiction, or that its decision of the Federal question was necessary to the determination of the cause, but also that such Federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York*, 293 U. S. 52, 54.

The only claim by petitioner of a Constitutional question being in the Record is in the reference at the foot of page 9 of its brief to that part of the opinion of the Trial Court which states (R. 274):

> "Plaintiff's difficulty lies in the fact that the franchises in question are unlimited as to time or duration. Such franchises constitute property.

> When granted they cannot be taken away save by the terms therein prescribed or by due process of law. (*People* v. *O'Brien*, 111 N. Y. 1; *City of N. Y.* v. *N. Y. Central RR.*, 234 N. Y. 113; *N. Y. & Queens Electric Light & Power Co.* v. *City of N. Y.*, 221 App. Div. 544; *Coney Island, Fort Hamilton & Brooklyn RR.* v. *Kennedy*, 15 App. Div. 588; *Eighth Ave. Coach Corp'n* v. *City of N. Y.*, 170 Misc. 243.) Under the settled law of the state the defendant has a property right in its franchises, from the enjoyment of which it cannot be excluded without compensation. If public necessity requires its exclusion the result can be accomplished by purchase or by condemnation (*Coney Island, Fort Hamilton & B'klyn RR.* v. *Kennedy, supra*). • • • "

On the basis of the above language of the Court petitioner claims the question of due process was raised in this case and being sustained against petitioner can be availed of on this application.

The above statement by the Trial Court, however, does not afford petitioner a basis for claiming a Federal question on this application.

In the first place, even if petitioner could, on this application, rely on a claim of constitutional right made by respondent, nevertheless petitioner's claim on this application is not the converse of respondent's claim (referred to in the above quoted extract from the opinion of the Trial Court) in respect of due process.

Petitioner predicated this action upon the resolution of the Common Council, adopted March 6, 1939 (R. 39-42) which purported to terminate respondent's franchises (R. 8).

Such resolution is on its face predicated solely on petitioner's claim that, no dates of maturity being specified in any of respondent's franchises, such franchises can be terminated at will.

The reference to due process, however, was predicated on the franchises being perpetual whereas petitioner's claim that the resolution was effective was predicated on its claim that such franchises were terminable at will. In other words, petitioner was not claiming a right to terminate respondent's franchises if they were perpetual but, as its resolution shows, was claiming the right to terminate them because, no time or duration being specified, they were terminable at will.

For petitioner to now invoke the converse of due process in respect of or as applied to respondent, petitioner would have to admit that respondent's franchises are perpetual and this it does not do but, on the contrary, claims on this application that such franchises should be construed as terminable at will.

It follows, therefore, that no question concerning due process is now available to petitioner on this application.

The above also conclusively shows that petitioner's claim in the State Courts was solely concerning the construction of respondent's franchises, that is to say, whether a franchise granted without limitation as to time or duration is perpetual or terminable at will, and the State Courts construed the franchises as being perpetual.

The construction of a contract is a common law question to be determined under State law and, moreover, as shown (*infra*, pp. 14-15) the decision of the State Courts construing the franchises as being perpetual is in accord with the applicable decisions of this Court.

Thus petitioner, having predicated its right to terminate the franchises on the ground that, no time being specified, they were terminable at will, the decision in this case turns solely on the question of the determination of whether the franchises were perpetual and not on any claim of due process or Federal question.

In the second place, it is to be noted that the above quoted extract from the opinion of the Trial Court (R. 274) makes no reference to the Constitution of the United States.

The Constitution of the State of New York contains a due process provision (Art. 1, Sec. 6) and a provision against the taking of private property for public use without compensation (Art. 1, Sec. 7).

Where the State Constitution contains a due process clause an averment that contemplated action of a municipality would deprive a complainant of his property without due process of law without making reference to the Constitution of the United States, or asserting express rights thereunder, is referable to the State Constitution alone and affords no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code.

Bowe v. *Scott*, 233 U. S. 658, 665.

See also:

Consolidated Turnpike Co. v. *Norfolk &c. Ry. Co.*, 228 U. S. 326, 331.

As we have hereinbefore pointed out, no mention of the United States Constitution was made at any stage of this case in the Courts below.

The decision of the Court of Appeals herein—the highest court of the State of New York—was rendered without opinion, and in the absence of an explicit statement by the Court of Appeals that its decision was based upon a Federal question, this Court has stated that it will not find that the decision of the Court of Appeals did not rest upon an adequate non-Federal ground.

McGoldrick v. *Gulf Oil Corporation*, 309 U. S. 2.

It follows therefore that inasmuch as the Record does not show that a Federal question was raised or decided herein in the State Courts below, there is no basis for invoking the jurisdiction of this Court under §237 of the Judicial Code.

POINT II.

Even if the courts below had decided a Federal question, as claimed by petitioner herein, such determination was in accord with applicable decisions of this court, and therefore the claim of a Federal question is without substance.

Even if Petitioner could assert a Federal question on this application, nevertheless the gravamen of this action is the construction of Respondent's franchises to be perpetual.

The Courts below, following applicable Court decisions of the State of New York, including, among others, *People* v. *O'Brien,* 111 N. Y. 1, determined that Respondent's franchises, containing no limitation as to time or duration of period of grant, were perpetual and constituted property which could not be taken away from the Respondent without due process of law including compensation.

This determination of the Courts below is in accord with applicable decisions of this Court, wherein this Court has held that franchises granted without limitation of time or duration of the grant are perpetual and cannot be terminated at will.

See

Louisville v. *Cumberland Telephone & Telegraph Company,* 224 U. S. 649;

City of Owensboro v. *Cumberland Telephone & Telegraph Company*, 230 U. S. 58;
Old Colony Trust Company v. *Omaha*, 230 U. S. 100;
Northern Ohio Traction & Light Co. v. *Ohio*, 245 U. S. 574;
Covington v. *South Covington & Cincinnati Street Railway Company*, 246 U. S. 413;
Ohio Public Service Company v. *Ohio, ex rel., Fritz*, 274 U. S. 12.

We have already answered the statement at page 7 of the petition that *People* v. *O'Brien*, 111 N. Y. 1, is not in accord with the applicable decisions of this Court (*supra*, p. 8).

Petitioner, overlooking the above applicable decisions of this Court, refers (p. 13 of its brief), to the cases of *Blair* v. *Chicago*, 201 U. S. 400, and *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, as authority for its contention that the decision of the State Courts herein is not in accord with the applicable decisions of this Court.

The above cases are not applicable.

Blair v. *Chicago, supra*, is in no way contrary to the general principle laid down by this Court in the cases above referred to that franchises granted without limitation as to time are perpetual.

In the first place, this Court in the *Blair* case held the franchise in question was not in perpetuity because such franchise was for an extension of an old system which was being operated under a franchise for a limited term and, therefore, it could not have been intended that the franchise in question (viz., the franchise for an extension) which was without a stated term was to extend beyond the stated term of the old system to which such franchise was an extension.

In the second place, this Court in the *Blair* case stated that it was willing to accept the Illinois holding.

New Orleans Gas Light Company v. *Drainage Commission, supra,* has no application to the question involved herein because in such case there was no attempt to take away the right of the Company to maintain its pipes and conduits in the streets, but merely the enforcement of a regulation which changed the location of such pipes and conduits in the streets.

It is clear therefore that the holding by the Courts below herein that Respondent's franchises, granted without limitation of time or duration of period of grant, were perpetual and could not be terminated at will, is in accord with the applicable decisions of this Court.

It follows, therefore, that Petitioner's claim that there is a Federal question which should be reviewed by this Court is devoid of any substantial foundation or merit, and furnishes no basis for an application for a writ of certiorari.

Consolidated Turnpike Company v. *Norfolk &c. Ry. Company,* 228 U. S. 596, 600;
Equitable Life Assurance Society v. *Brown,* 187 U. S. 308, 311, 314.

POINT III.

Answering Petitioner's Point I.

No Question of Due Process Is Available to Petitioner.

The resolution purporting to terminate respondent's franchises is on its face predicated solely on petitioner's claim that, no dates of maturity being specified in any of

respondent's franchises, such franchises can be terminated at will (R. 40).

Thus, by the express terms of such resolution, its effectiveness depended entirely on the construction of the franchises—a common law question—and the State Courts having construed such franchises to be perpetual no question of due process is available.

In other words, the reference in the opinion of the Trial Court to due process (R. 274) was predicated on the franchises being perpetual whereas petitioner claims that such franchises were terminable at will and predicated the effectiveness of the resolution of termination on that premise.

For petitioner to now invoke the converse of due process in respect of or as applied to respondent, petitioner would have to admit that respondent's franchises are perpetual and this it does not do, but comes into Court claiming that such franchises should be construed as terminable at will.

At page 10 petitioner makes the argument that the decision of the Supreme Court of the State of New York that the franchises are perpetual, has deprived petitioner of its property without due process of law. If such statement can be said to present a Federal question then a conclusive answer thereto is that no such question was presented in the Courts below and, therefore, cannot be made the basis of an application for a writ of certiorari.

Nor is there any merit whatsoever in petitioner's argument that it has been denied due process by the decision of the State Supreme Court that respondent's franchises are perpetual. Petitioner instituted this action in the State Court to determine the rights of the parties with respect to such franchises and has, therefore, had its day in Court, and the rights of the parties have, pursuant to the prayer of petitioner, been determined.

The contention that such decision is erroneous does not in and of itself present a Federal question under the due process clause of the Constitution.

Tracy v. *Ginzberg*, 205 U. S. 170;
Bonner v. *Gorman*, 213 U. S. 86;
American Railway Express Company v. *Kentucky*, 273 U. S. 269, 273;
Bell Telephone Company of Pennsylvania v. *Pennsylvania Public Utility Commission*, 309 U. S. 30, 32.

At page 10 of petitioner's brief to this Court the statement is made that the petitioner offered to respondent an opportunity to provide a modern method of transportation and that respondent refused such offer. While such statement has no bearing upon the application now before this Court we point out that there is nothing in the Record to justify the statement of the petitioner last above referred to, and the statement is incorrect.

POINT IV.

Answering Petitioner's Point II.

The Construction of the Franchises Is a Common Law Question for Determination by the State Court Which Cannot Be Presented to, or Relied Upon in, This Court on This Application.

POINT V.

Answering Petitioner's Point III.

The Decision of the Supreme Court of the State of New York Is in Accord With the Applicable Decisions of This Court.

This has been fully shown in Point II, *supra.*

CONCLUSION.

The Petition Should Be Denied.

Dated, September 14, 1942.

Respectfully submitted,

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